

(1) RECEIVED - Supreme Court, U. S.

~~SEARCHED~~

~~MAR 31 1943~~

CHARLES ELMORE GROPPLEY  
CLERK

IN THE  
**Supreme Court of United States**  
OCTOBER TERM, 1942.

3194S #2  
No. 874 SWO-TRA

THOMAS H. SWOPE AND VIRGINIA McALPINE,  
PETITIONERS AND APPELLANTS BELOW,

VS.

KANSAS CITY, KANSAS, a municipal corporation;  
ROY WHEAT, FRANK BROWN and FRANK H.  
HOLCOMB, County Commissioners of Wyandotte  
County, Kansas; UNION PACIFIC RAILROAD COM-  
PANY, a corporation; and the MINNESOTA AVENUE,  
INC., a corporation, RESPONDENTS AND APPEL-  
LEES BELOW.

---

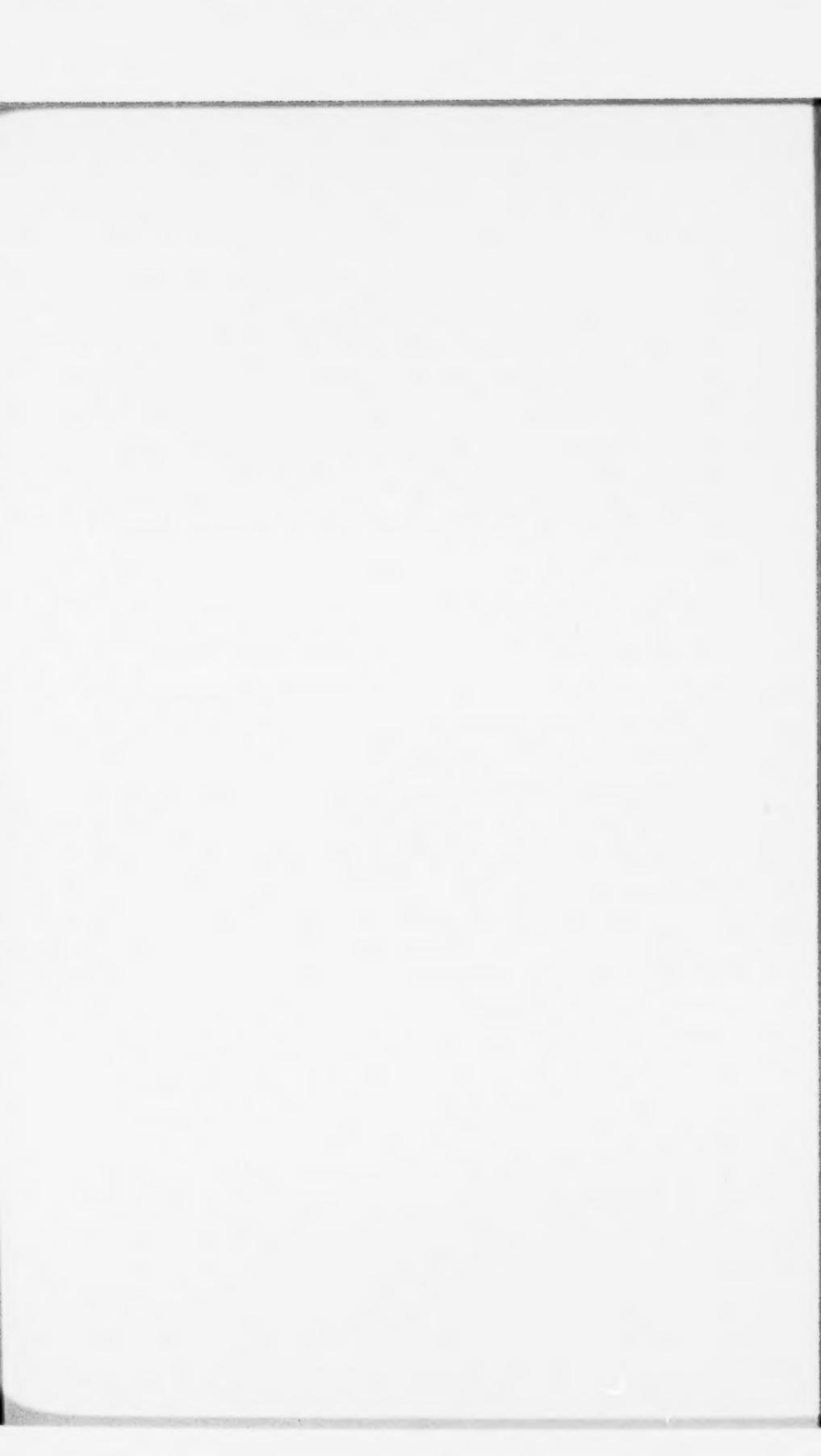
PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE TENTH CIRCUIT AND BRIEF IN  
SUPPORT THEREOF.

---

Wm. H. McCAMINN,

*Counsel for Petitioners.*









## INDEX.

	PAGE
Petition for Writ of Certiorari .....	1
A. Summary Statement of Matter Involved....	2
B. Statement of the Jurisdiction of this Court	4
C. Questions Presented .....	6
D. Reasons Relied on for Allowance of the Writ	6
Conclusion .....	8

### BRIEF IN SUPPORT

A. Opinion of the Court Below .....	11
B. Grounds on Which Jurisdiction Invoked....	12
C. Statement of the Case .....	12
D. Specification of Errors .....	13
E. Summary of the Argument .....	14
F. Argument .....	15
Point I .....	15
Point II .....	18
Point III .....	21
Point IV .....	23
Point V .....	23
Errors of Fact in the Opinion Below .....	24
Conclusion .....	25

### TABLE OF CASES.

Attorney General v. Tarr, 148 Mass. 309, 19 N. E. 358 .....	21, 22
Barney v. Keokuk, 94 U. S. 324 .....	20

## INDEX

II

	PAGE
Belcher Co. v. Elevator Co., 82 Mo. 121.....	21
Betcher v. Railway Co., 110 Minn. 228, 124 N. W. 1096 .....	21
Campbell v. Kansas City, 102 Mo. 326, 344, 13 S. W. 897 .....	17
Chase National Bank v. City of Norwalk, 291 U. S. 431, 54 S. C. 475, 78 L. Ed. 894.....	8, 23
City of St. Paul v. C. M. & S. P. Ry. Co., 63 Minn. 330, 68 N. W. 458 .....	21, 22
City of St. Paul v. Railway Co., 65 N. W. 648..	22
Commissioners v. Lathrop, 9 Kansas 453.....	7, 16
C. R. I. & P. R. Co. v. People, 222 Ill. 427, 78 N. E. 790.....	20
Gardiner v. Tisdale, 2 Wis. l. c. 188 .....	20
Juneau Ferry Co. v. Morgan, 236 Fed. 204 (9th Cir.) .....	8, 13, 23
Kansas City v. Woods, 117 Kansas 141, 230 Pac. 79 .....	7, 8, 13, 17, 18
Louisville, et al. Ry. Co. v. City of Cincinnati, 76 Ohio St. 481, 81 N. E. 983 .....	21
McAlpine v. Railway Company, 68 Kansas 207, 75 Pac. 73 .....	7, 16, 17
McCann v. Inhabitants, 107 Me. 393, 78 Atl. 465	21
New Orleans v. United States, 10 Peters 662....	20
People v. Daxeee, 136 App. Div. 400, 120 N. Y. S. 962 .....	21
Poole v. Commissioners, 9 Del. Ch. 192, 80 Atl. 683 .....	21
Porter v. Bridge Co., 200 N. Y. 234, 93 N. E. 716	16
Richard v. Flinn, 189 Pa. 355, 42 Atl. 23.....	21
Sanborn v. Van Duyne, 90 Minn. 215, 96 N. W. 41 .....	21

## INDEX

	PAGE
State ex rel. v. City of Kansas City, 151 Kansas 2, 98 Pac. (2d) 101 .....	7, 15, 19
State ex rel. v. City of Manhattan, 115 Kansas 794, 225 Pac. 85 .....	7, 16
State ex rel v. Dreyer, 229 Mo. 201, 129 S. W. 904 .....	19
Streuber v. Alton, 319 Ill. 43, 149 N. E. 577....	21
Union Pacific Railroad Co. v. United States, 313 U. S. 450, 61 S. C. 1064, 85 L. Ed. 1512.....	3, 15, 19
Young v. Board, 51 Fed. 585 .....	16

## STATUTES.

Act Approved February 11, 1859—Gen. St. Kan- sas 1935—Chapter 12-406 .....	2
Rev. St. Kansas 1935—Chapter 13, 1074 to 1077	3
Section 240 (a) of the Judicial Code, as Amended by the Act of February 13, 1925, C. 229, Section 1, 43 St. 938, 28 U. S. C. A. 347 a.....	4
Section 240 (a) of the Judicial Code, as Amended by the Act of February 13, 1925, C. 229, Section 8, 24 Stat. 940, 28 U. S. C. A. 350.....	5

## TEXT BOOKS.

18 C. J. 125 .....	16
26 C. J. S. 140, 154, 155 .....	16
26 C. J. S. 153 .....	16

IN THE  
**Supreme Court of United States**  
OCTOBER TERM, 1942.

—◆—  
**No. ....**  
—◆—

THOMAS H. SWOPE AND VIRGINIA McALPINE,  
PETITIONERS AND APPELLANTS BELOW,  
VS.

KANSAS CITY, KANSAS, a municipal corporation;  
ROY WHEAT, FRANK BROWN and FRANK H.  
HOLCOMB, County Commissioners of Wyandotte  
County, Kansas; UNION PACIFIC RAILROAD COM-  
PANY, a corporation; and the MINNESOTA AVENUE,  
INC., a corporation, RESPONDENTS AND APPEL-  
LEES BELOW.

—◆—  
**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE TENTH CIRCUIT.**  
—◆—

To THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Thomas H. Swope and Virginia  
McAlpine, in support of their petition for a writ of  
certiorari to review the final judgment of the United  
States Circuit Court of Appeals for the Tenth Circuit,

entered December 31st, 1942, affirming the judgment of the United States District Court for the District of Kansas, respectfully show:

**A.**

**SUMMARY STATEMENT OF THE MATTER INVOLVED.**

This was an action for a declaratory judgment (R. 7) brought in the District Court of the United States for the District of Kansas by your petitioners against Kansas City, Kansas, a municipal corporation, Roy Wheat, Frank Brown and Frank H. Holecomb, County Commissioners of Wyandotte County, Kansas; Union Pacific Railroad Company, a corporation; and the Minnesota Avenue, Inc., a corporation, involving the following facts and issues:

In 1859 the owners of the townsite of Wyandotte, Kansas, now Kansas City, Kansas, filed a plat of said townsite with the Register of Deeds. On the plat appeared the outlines of a tract of land at the junction of the Kaw or Kansas River and the Missouri River (R. 55). This tract was about 100 acres in extent, and on the plat bore the legend "Levee" (R. 55), and on the back of the plat, under the heading "Public Grounds," appeared the words, "The Levee," and describing its location, corresponding in this respect to the plat (R. 55).

When the plat was filed, the then Statute of Kansas provided that such filing of such a townsite plat should vest the fee to parcels of land therein expressed, named or intended for public use in the County where the land was situate, "In trust and for the uses therein named expressed or intended, and for no other use or purpose." (Act approved February 11, 1859—Gen. St. Kansas 1935—Chapter 12-406).

In 1929 the State of Kansas enacted a law that provided that cities of the class of Kansas City, after reserving a strip of ground along the river front for public landing and the erection thereon of public docks and wharfs, should have the power and authority to lease the remaining parts of their levees, whether acquired by dedication or otherwise, for terms not in excess of 99 years, and for various use purposes, including industrial establishments (Rev. St. Kansas 1935—Chapter 13, 1074 to 1077).

Thereafter, Kansas City, Kansas erected on the levee property a perishable food market at the cost of five million dollars (R. 33). This is the food market with which this Court dealt in the case of *Union Pacific Railroad Company v. United States*, (313 U. S. 450, 61 S. C. 1064, 85 L. Ed. 1512). A photograph of it appears in the record (R. 83), where also appears a view of the railyard built by respondent, Union Pacific Railroad Company, to serve the food market under a long term lease (R. 68, et seq.). After the decision of this Court in the above case, Kansas City, Kansas leased the food terminal for up to 30 years to respondent, The Minnesota Avenue, Inc. and for any lawful use purpose (R. 85).

The food terminal, and the Union Pacific railyard cover between them probably three-fourths of the levee property (Exhibits, R. 77 and 83).

The Petitioners herein are, respectively, citizens and residents of the State of Missouri, and of the State of Illinois. The respondents are citizens and residents of the State of Kansas. The value of the matter in controversy in the District Court meets the jurisdictional requirements.

The petitioners are heirs at law of various of the seven dedicators of this levee property (R. 35 to 50).

They contended in their complaint (R. 7), and by their evidence, that the Kansas Act of 1929, and the uses to which most of the property has since been put, constitute, between them, a full and lawful abandonment, by State and dedicatee, of the dedication purposes in respect to the land so used: that the use of such part of the levee, for levee or street or dyke purposes or, in truth, for any other public use, has been definitely and finally abandoned. The petitioners contended below that, in view of such abandonment, they, as heirs of the dedicators, should be compensated by the payment of the *reasonable naked land value* of the land so abandoned for public use. And they prayed for a declaratory judgment so declaring their rights. In the alternative, your petitioners asserted that the present uses of the levee constitute purprestures.

#### **The Judgment of the District Court.**

The trial court, finding the above facts to be true (R. 20, et seq.) found the legal conclusions, drawn by the petitioners from those facts, to be unsound, and declared that the petitioners had shown no right to relief, and rendered judgment accordingly (R. 26).

#### **The Judgment of the Circuit Court of Appeals.**

The Circuit Court of Appeals affirmed the judgment of the trial court, in an opinion filed December 31, 1942, and published in 132 Fed. (2d) 788.

### **B.**

#### **STATEMENT OF THE JURISDICTION OF THIS COURT.**

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, Section 1, 43 Stat. 938 (28

U. S. C. A. 347 a), and under the same Act, C. 229, Section 8, 24 Stat. 940 (28 U. S. C. A. 350).

**The Date of the Judgment to be Reviewed.**

The judgment of the Circuit Court of Appeals for the Tenth Circuit, affirming the judgment of the District Court for the District of Kansas, was entered on the 31st day of December, 1942. This petition, with supporting brief, and the certified record, are filed within three months next after the final judgment sought here to be reviewed.

**Statement of the Nature of The Case and The Rulings  
Bringing The Case within the Jurisdiction of  
This Court.**

The nature of the case has been heretofore stated. The Circuit Court of Appeals ruled: (1) That what has been done to this levee property does not constitute an abandonment of it for public levee purposes; (2) That such new uses will promote river traffic and enhance the value of the property for public levee purposes; (3) That such new uses are within the discretionary powers of defendant city as trustee of this public trust property.

The jurisdiction of the Federal Court of this cause has not been questioned. Each of the rulings of the Circuit Court of Appeals is reviewable by this Court under the appropriate statutory provisions noted.

**Cases Believed to Sustain the Jurisdiction of This Court.**

This Court is vested with jurisdiction under the statutory provisions heretofore specified. The cases submitted by petitioner as the basis for the exercise of such jurisdiction, to review the judgment below, are cited hereafter in connection with petitioner's reasons for the allowance of the Writ of Certiorari.

**C.****THE QUESTIONS PRESENTED.**

(1) Where property has been dedicated for a specific public purpose and under such a statute as the Kansas Act of 1859, and the State thereafter, by Statute, empowers the trustee of such public trust, after reserving for the dedication use part of the dedicated property, to lease for its own profit, the remainder thereof, to private enterprises under leases not in excess of 99 years, does this constitute "lawful abandonment", for the dedication purposes, of such leasable land?

(3) Where property is dedicated for public levee use, is the erection thereon of costly and permanent buildings specially designed for a wholesale perishable food market or terminal, and leaseable to anyone for any lawful enterprise, together with the building of a railyard specially designed to serve such buildings, promotive of and consistent with the dedication purposes and contract?

**D.****REASONS RELIED ON FOR THE ALLOWANCE  
OF THE WRIT.**

(1) In ruling that, upon land dedicated for a public levee, the erection thereon by the dedicatee of costly and permanent buildings specially designed for a perishable wholesale food terminal, and the use of such buildings for private enterprise of every lawful nature by the lessees of the dedicatee, is promotive of and consistent with, the uses to which the land was dedicated, the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, to-wit:

*McAlpine v. Railway Company*, 68 Kansas 207,  
75 Pac. 73.

*Kansas City v. Woods*, 117 Kansas 141, 230  
Pac. 79.

(2) In ruling that where property is dedicated by the owners to a specific public use, the dedicatee, as trustee of that public trust, has the discretionary power, as such trustee, to devote the property to alien or foreign uses for the pecuniary advantage of the trustee and others, the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, to-wit:

*State ex rel. v. City of Manhattan*, 115 Kansas  
794, 225 Pac. 85.

*Commissioners v. Lathrop*, 9 Kansas 453.

*McAlpine v. Railway Company*, 68 Kansas 207,  
75 Pac. 73.

*Kansas City v. Woods*, 117 Kansas 141, 230 Pac.  
79.

(3) In ruling that, in the erection of the perishable food terminal and the leasing of it for various private uses and purposes, the City respondent was acting within its powers as a trustee, and not in its proprietary capacity, the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, to-wit:

*State ex rel. v. City of Kansas City*, 151 Kansas  
2, 98 Pac. (2d) 101.

*Commissioners v. Lathrop*, 9 Kansas 453.

*State ex rel. v. City of Manhattan*, 115 Kansas  
794, 225 Pac. 85.

*McAlpine v. Railway Company*, 68 Kansas 207,  
75 Pac. 73.

*Kansas City v. Woods*, 117 Kansas 141, 230 Pac. 79.

(4) In ruling that where land is, by private dedication, dedicated for public levee use, the dedicatee trustee may grant the exclusive use of any part of such land to private uses, the Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, to-wit:

*Juneau Ferry Co. v. Morgan*, 236 Fed. 204 (9th Cir.).

(5) In so construing the opinion in *Kansas City v. Woods*, 117 Kansas 141, 230 Pac. 79, as to constitute that opinion stare decisis against the petitioners herein, and as conclusive against their claim and position in this case, the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with an applicable decision of this Court, to-wit:

*Chase National Bank v. City of Norwalk*, 291 U. S. 431, 54 S. C. 475, 78 L. Ed. 894.

#### **Conclusion.**

Each of the questions presented is of grave public importance. Unless the opinion below is reviewed, the law relating to dedications of land for public purpose, and the law of abandonment and misuser of dedicated land, will be left in confusion and doubt. Whether land dedicated for a specific public purpose may be applied to purposes of private use and profit of the dedicatee and others, is a question of fundamental importance in law and to the cause of common justice. So, also, is the question whether a decision in an amicable action (*Kansas City v. Woods, supra*), deciding matters of right between one of the parties (Kansas City, Kansas) and per-

sons not party to the proceedings (dedicators), may, under the Federal Constitution, constitute stare decisis against the latter.

Wherefore, your petitioners pray that a Writ of Certiorari issue under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the records and proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket as Number 2562, Thomas Swope, et al., Appellants, v. Kansas City, Kansas, et al., Appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said Circuit Court of Appeals be reversed by this Court; and your petitioners pray that the certified copy of the record and proceedings of said United States Circuit Court of Appeals for the Tenth Circuit, filed with this petition, may be treated as a return to said Writ of Certiorari; and your petitioners pray that they may have such other and further remedies as to the Court may seem appropriate and in conformity with law.

THOMAS H. SWOPE AND  
VIRGINIA MCALPINE,  
*Petitioners.*

Wm. H. McCAMISH,  
*Counsel for Petitioners,*  
Kansas City, Kansas.